Filed 1/11/19 Doan v. Doyle CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

WILLIAM DOAN, Plaintiff and Appellant, v. THOMAS J. DOYLE, Defendant and Respondent.	C086446 (Super. Ct. No. 34-2017-00216710-CU-MC-GDS)

Plaintiff William Doan appeals from the judgment dismissing his action for unfair business practices entered after the trial court sustained defendant Thomas J. Doyle's demurrer without leave to amend. (Code Civ. Proc., §§ 430.10, 904.1, subd. (a)(1).)[1] Doan argues the trial court erred in: (1) denying leave to amend his complaint; (2) asserting the applicability of the litigation privilege on Doyle's behalf; (3) ruling that

[1] Further undesignated statutory references are to the Code of Civil Procedure.

refusing to agree to electronic service cannot be construed as an unfair business practice; and (4) refusing to consider Doyle's duty as an attorney to be fair to an unrepresented party.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The facts that follow are alleged in Doan's August 3, 2017, complaint for unfair business practices, declaratory and injunctive relief, and damages.[2]

Doyle was the managing partner of a law firm representing a defendant in a different civil action Doan had previously filed. Doan and Doyle spoke on the phone regarding Doan's offer of settlement, which was transmitted to Doyle via e-mail. Doyle confirmed receipt of the offer via e-mail. The next day, Doyle and Doan spoke again, and Doyle conveyed his client's rejection of Doan's settlement offer. On this call, Doan "requested that future papers be served and accepted by parties by electronic service. [Doyle] declined [Doan's] request and insisted that future papers be served and accepted by the parties via U.S. postal mail." Doan threatened to "file a motion to compel [Doyle] to accept electronic service, to which [Doyle] replied: 'The court cannot compel me to accept "electronic service." ' "

The complaint set forth the text of section 1010.6, subdivision (a)(1)(A) and California Rules of Court, rule 2.251(a)-(c). It then alleged that given the history of previous electronic service referenced earlier in the complaint, Doyle's "refusal to accept future papers by electronic service was absolutely unreasonable and without justification(s). [¶] Especially in light of the statutory authorizations under CCP § 1010.6(a)(1)(A) and pursuant to CRC 2.251(a)(b)(c), the refusal to consent to electronic

---

[2] In reviewing an order sustaining a demurrer, we assume the factual allegations pleaded to be true. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.)

service by . . . Doyle can be seen as oppressive in that Defendant's refusal was intended (i) to force Plaintiff to incur long-term expenses, (ii) to discourage Plaintiff to continue his litigation endeavor; and (iii) to encourage Plaintiff to dismiss the suit."

It further alleged "in light of [Doyle's] verbal assertion of the court's inability and/or lack of authority to compel [Doyle] to accept electronic service, [Doyle] breached his professional duty of civility, as set forth in the California Attorney Guidelines of Civility and Professionalism, section 4, paragraph h . . . ." Doyle's action "was and is malicious, and oppressive, as defined in the California Civil Code, section 3294(c)(1)(2)."

It requested declarations that: (1) Doyle's "refusal to consent to [Doan's] request for electronic service was and is malicious and oppressive in that such refusal imposes an undue burden on [Doan] in the form of unnecessary long-term expenses in postage fees"; (2) Doyle's "refusal to consent to [Doan's] request for electronic service was and is an act of [*sic*] becoming an officer of the court"; and (3) Doyle's "refusal to consent to [Doan's] request for electronic service was and is an act of engaging in unfair business practice." It further sought preliminary and permanent injunctions enjoining: (1) Doyle "from further act of engaging in unfair business practice" and (2) Doyle "and the law office of SCHUERING ZIMMERMAN & DOYLE, LLP from further representation of the defendants in Doan v. Goshal." Finally, Doan sought damages (compensatory, general, and punitive), as well as the costs of his suit and whatever other relief the court may grant.

Doyle's Demurrer

Doyle demurred to the entirety of Doan's complaint, arguing it failed to aver facts that state a cause of action under Business and Professions Code section 17200 et seq. because "[r]efusal to consent to electronic service of papers does not offend established public policy, nor is it immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." It further argued leave to amend would be inappropriate

because there was no liability as a matter of law, and the lawsuit had been filed in an attempt to manufacture a conflict of interest to disqualify Doyle's firm from representation in the *Doan v. Goshal* matter.

Doan opposed the demurrer, arguing: (1) a general demurrer was not an appropriate vehicle to test the merits of a declaratory relief action and (2) Doyle failed to assert any facts supporting his assertions in the demurrer regarding reasons why a law firm might prefer service by mail. Notably, Doan did not seek leave to amend or explain how his complaint could be amended to cure any defects.

The Ruling on Demurrer

On October 23, 2017, the trial court issued its tentative ruling sustaining Doyle's demurrer. It does not appear that either party requested oral argument, and Doyle's proposed order affirming the tentative ruling was entered by the court on November 8, 2017. This ruling stated in pertinent part: "As [Doan] acknowledges in his complaint, documents may be served electronically by consent of the parties. Electronic service is not mandatory, and Doyle's mere refusal to consent cannot be construed as an unfair business practice. Plaintiff's reliance on *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4[t]h 734 for the proposition that a general demurrer is not appropriate for a declaratory relief cause of action is unavailing. In *Qualified Patients Assn*., the court concluded that the plaintiff had stated a legally sufficient complaint for declaratory relief, thus, the demurrer was not the proper context to 'reach and resolve' the merits of [the] plaintiff[']s claim for declaratory relief. Here, the Court concludes that [Doan] fails to state sufficient facts. Additionally, [Doan's] action appears to be barred by the litigation privilege. (Civ. Code 47(b).) [¶] The demurrer is sustained without leave to amend."

The judgment dismissing the action was filed January 11, 2018, and Doan timely appealed.

DISCUSSION

Doan's arguments fall into two categories: the propriety of the trial court's sustaining of the demurrer and whether the court erred in failing to afford Doan the opportunity to amend his complaint. We address Doan's arguments in that order.

I

Standard of Review

"A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law. [Citations.]" (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316.) Thus, the standard of review on appeal is de novo. (*Ibid*.)

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"To satisfy that burden on appeal, a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.] The plaintiff must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, plaintiff must set forth factual allegations

that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary. [Citation.]" (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44.)

II

The Demurrer

At the outset, we note that while Doan is representing himself in this litigation, he is nonetheless held to the same standards and rules of procedure as an attorney. (See *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.) Thus, it was Doan's burden to specifically identify the applicable substantive law and the factual allegations pertaining to all required elements of his cause of action. (*Rakestraw v. California Physicians' Service*, *supra*, 81 Cal.App.4th at pp. 43-44.) He has not met this burden.

Doan's complaint rests on the premise that Doyle's failure to consent to electronic service may be properly construed as a violation of the Unfair Competition Law (UCL). (Bus. & Prof. Code, § 17200 et seq.) It cannot.

As explained in *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144 (*Hertz Corp.*): "The remedies available under this law, which are generally limited to injunctive relief and restitution, are 'cumulative . . . to the remedies or penalties available under all other laws of this state.' ([Bus. & Prof. Code,] § 17205.) 'In contrast to its limited remedies, the unfair competition law's scope is broad. Unlike the Unfair Practices Act [(Bus. & Prof. Code, § 17000 et seq.)] it does not proscribe specific practices. Rather, as relevant here, it defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice." ([Bus. & Prof. Code,] § 17200.) Its coverage is "sweeping, embracing ' "anything that can properly be called a business practice and that at the same time is forbidden by law." ' " [Citation.] It governs "anti-competitive business practices" as well as injuries to consumers, and has as a major purpose "the preservation of fair business competition." [Citations.] By proscribing "any unlawful" business practice, "[Business and Professions Code] section 17200 'borrows' violations of other

laws and treats them as unlawful practices" that the unfair competition law makes independently actionable. [Citation.]

" 'However, the law does more than just borrow. The statutory language referring to "any unlawful, unfair *or* fraudulent" practice (italics added) makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law. "Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition--acts or practices which are unlawful, or unfair, or fraudulent. 'In other words, a practice is prohibited as "unfair" or "deceptive" even if not "unlawful" and vice versa.' " [Citation.]' [Citation.]" (*Hertz Corp., supra,* 78 Cal.App.4th at pp. 1152-1153.)

However, the reach of the UCL "is not unlimited." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 182.) " 'Courts may not simply impose their own notions of the day as to what is fair or unfair. Specific legislation may limit the judiciary's power to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination. When specific legislation provides a "safe harbor," plaintiffs may not use the general unfair competition law to assault that harbor.' [Citation.]" (*Hertz Corp., supra,* 78 Cal.App.4th at p. 1154.) Thus, a UCL action premised upon unfair conduct fails where a law specifically allows the challenged action. (*Id*. at pp. 1154, 1156, 1160-1161 [avoidable fuel service charges authorized by law and thus not unfair business practice].)

While the trial court's ruling sustaining Doyle's demurrer does not expressly invoke the UCL's safe harbor, the lawfulness of the refusal to accept electronic service was the underlying basis for the court's ruling on demurrer. It stated, "As [Doan] acknowledges in his complaint, documents may be served electronically by consent of the parties. Electronic service is not mandatory, and Doyle's mere refusal to consent cannot be construed as an unfair business practice." We agree.

Section 1010 states: "Notices and other papers may be served upon the party or attorney in the manner prescribed in this chapter, when not otherwise provided by this code." Section 1010.6, subdivision (a)(2)(A)(i) recognizes that, "[f]or cases filed on or before December 31, 2018, if a document may be served by mail, express mail, overnight delivery, or facsimile transmission, electronic service of the document *is not authorized unless* a party or other person *has agreed* to accept electronic service in that specific action. . . ." [3] (Italics added, see also Cal. Rules of Court, rule 2.251(b)(1) [recognizing ability to consent to electronic service].) Thus, the Code of Civil Procedure puts in the hands of the party receiving service the choice of whether to accept electronic service and expressly recognizes that such service is not authorized in the absence of that consent. By refusing to consent and insisting on service as otherwise provided for in Chapter 5 of the Code of Civil Procedure, Doyle was acting in accordance with the rights the law afforded him. This cannot constitute the basis for a UCL claim. (*Hertz Corp.*, *supra*, 78 Cal.App.4th at pp. 1154, 1156, 1160-1161.) This result is not altered by any rules of attorney ethics meant to challenge the propriety of Doyle's refusal to consent.[4] (See *id.* at pp. 1160-1161 [legislature's authorizing fuel charges "insulate[d] the reasonableness of such charges from judicial scrutiny"].)

Because Doan's complaint is premised on Doyle's inability to refuse electronic service and the harm allegedly flowing therefrom, the trial court did not abuse its

---

[3] We recognize this subdivision goes on to allow for electronic service if authorized by local rule, because the proceeding is complex, or for other specified exceptions that do not apply to this case. (§ 1010.6, subd. (a)(2)(A)(i) [exceptions found in subds. (c) & (d)]; accord, Cal. Rules of Court, rule 2.251(c)-(d).)

[4] To the extent Doan's argument may be construed as independently requesting declaratory relief concerning Doyle's compliance with ethical rules, we note that such complaints may be addressed to the California State Bar (Bus. & Prof. Code, § 6075 et seq.), and do not independently qualify for declaratory relief under section 1060.

discretion in failing to grant Doan leave to amend his complaint. (See *Community Assisting Recovery, Inc. v. Aegis Security Ins. Co*. (2001) 92 Cal.App.4th 886, 895 [upholding sustaining of demurrer without leave to amend where the plaintiff failed to provide a proposed amendment and demonstrate how that amendment would cure the original pleading's defect].) Sustaining the demurrer without leave to amend was particularly appropriate given that Doan did not even ask to amend his complaint, much less make the required showing.[5]

DISPOSITION

The judgment is affirmed. Defendant Doyle shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/s/
Duarte, J.

We concur:

/s/
Butz, Acting P. J.

/s/
Mauro, J.

[5] Given that the trial court properly sustained Doyle's demurrer without leave to amend, we do not consider whether Doan's complaint was also barred by the litigation privilege.